Supreme Court, U.S.
FILED

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No. .....

IN THE

Supreme Court of The United States

October Term, 1994

SHON EDWARD ENCINAS,

Petitioner,

v.

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS; DARLENE ATKINSON STROUP, as Executive Officer

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

Shon Edward Encinas,
in Pro Se
3638 Kelton Avenue
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(310) 559-7405

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA

Question Presented for Review

1. Whether a state may consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution, deny a hearing to an applicant for a professional license, for the reason that allowing every applicant an opportunity for a hearing would "place an undue, if not impossible, burden upon the State."

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IN THE

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October Term, 1994

SHON EDWARD ENCINAS,

Petitioner,

v.

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS; DARLENE ATKINSON STROUP, as Executive Officer

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

The petitioner Shon Edward Encinas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, Second Appellate District, Division Five, entered in the above-entitled proceeding on April 13, 1994.

OPINIONS BELOW

The opinion of the Court of Appeal of California, Second Appellate District, Division Five is unpublished. It is reprinted in the appendix hereto, p. 14, *infra*.

The denial of petition to review by the Supreme Court of California is reprinted in the appendix hereto, p. 12, *infra*.

The Statement of Decision and the Judgment of the Superior Court of the State of California for the County of Los Angeles, Department 85 is reprinted in the appendix hereto, p. 24, *infra*.

The letter from the Board of Registration for Professional Engineers and Land Surveyors is reprinted in the appendix hereto, p. 28, *infra*.

JURISDICTION

The judgment of the Appellate Court sought to be reviewed was filed on April 13, 1994. Denial of petition to review was filed by the California Supreme Court on July 13, 1994. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 2: "* * * nor shall any State deprive any person of * * * property without due process of law. * * *"

STATEMENT OF THE CASE

Petitioner Shon Edward Encinas sat for the October 1990 electrical engineering examination offered by respondent Board of Registration for Professional Engineers and Land Surveyors; Darlene Atkinson Stroup, as executive officer. Passing the examination is one of the requirements for being licensed as a professional engineer in the State of California. Although the test is offered by respondent, it is drafted, prepared, and graded by the National Council of Examiners for Engineering and Surveying ("NCEES"), an independent organization. Encinas failed to pass the examination by one point.

The procedure for appealing examination results is set forth by statute, Title 16, California Code of Regulations, sections 443 and 444. The applicant is given the opportunity to review his or her examination and prepare a written appeal. The actual statute is silent as to whether or not a hearing is allowed, but the opinion of the respondent that there is no right to a hearing is contained in a pamphlet given to each applicant when the

applicant applies for the examination. Petitioner duly prepared a written appeal contesting a question in which petitioner received 4 points out of a possible 10 points.

Instead of reviewing the appeal itself, the respondent relayed the appeal to the NCEES. The NCEES decided the score should remain the same. In support of its opinion, the NCEES added an additional criticism of petitioner's answer not made on the original grading sheet. Without allowing petitioner to see or comment upon the opinion of the NCEES, the respondent adopted the opinion and notified petitioner by letter that he had failed to pass the test.

Since the opinion of the respondent was that petitioner had no right to an administrative hearing, petitioner petitioned the Superior Court for an alternative writ of mandate, asking respondent to show cause why more points should not be awarded for petitioner's answer to the disputed test question, and a peremptory writ of mandate to respondent to issue a professional engineering license to petitioner if more points were awarded. As part of his argument, petitioner argued that his due process rights were violated because he was not privy to the manner in which the appeal was reviewed and the question reevaluated.

In response, without petitioner's knowledge, respondent again submitted petitioner's written appeal to the NCEES. Again the NCEES's opinion was that no additional points should be awarded for petitioner's answer. In its response to petitioner's opening brief, respondent stated that due process does not require the

licensing agency to provide a failing examinee with a full administrative hearing.

The Superior Court in its decision in favor of respondent, discharged the alternative writ of mandate and denied the peremptory writ. The Court in its decision said that respondent did not "fail to proceed in the manner required by law." The Appellate Court in its decision said that "this specific finding reveals that the court did consider, but rejected petitioner's procedural due process argument." Rather than remanding the matter to respondent for an administrative hearing, the Superior Court used the substantial evidence test, giving great weight to the ex parte opinion of the NCEES.

Petitioner then appealed to the Appellate Court. Petitioner expressly raised the Federal question herein on page 18 of his opening brief, stating:

"The case of Endler v. Schutzbank (1968) 68 Cal.2d 162; 65 Cal.Rptr. 297; 436 P.2d 297 better explains why the hearing in the instant case is compelled by due process:

> We therefore begin with the settled proposition that a state cannot exclude a person from ... any ... occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. [Citations]" Endler v. Schutzbank, *supra*, 68 Cal.2d at p. 170)."

The Appellate Court affirmed the judgment of the Superior Court. It used the procedural due process cost-

benefit test introduced by this Court in *Mathews v. Eldridge* (1976) 424 U.S. 319, 47 L.Ed. 18, 96 S. Ct. 893. The Appellate Court expressly passed on the constitutional issue by stating in its opinion:

> "Requiring the Board, and by implication other similar Boards, to provide a hearing to every unsuccessful test-taker for a professional license would place an undue, if not impossible, burden upon the State. [Citation] [¶] We hold, therefore, that the procedures set forth in the applicable statutes provide appellant with procedural due process, and he is entitled to nothing more."

Petitioner filed a petition for rehearing by the Appellate Court. Rehearing was denied with no changes to the original opinion.

Petitioner subsequently filed a petition to the California Supreme Court. The federal question herein was again raised by petitioner on page 1 of the Petition for Review:

> "II. ISSUES PRESENTED
>
> 1. Whether the denial of a hearing to an applicant for a license deprives the applicant of due process of law under the Fourteenth Amendment to the United States Constitution."

The petition for review was denied. Although the California Supreme Court did not expressly pass upon the constitutional issue, it could not have affirmed the decision below without resolving the constitutional question. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

REASONS FOR GRANTING THE WRIT

I.

The decision of the Appellate Court denying a hearing for an applicant for a license conflicts with the due process clause of the Fourteenth Amendment as previously construed in applicable decisions of this Court.

There was never an evidentiary hearing to determine the facts in this case. Petitioner was denied a hearing before respondent, and both the trial court and the Court of Appeal used the substantial evidence test to review repondent's decision. As a result, petitioner has never been afforded an adequate opportunity to challenge the two regradings made by the NCEES, which the respondent relied upon to reach its decision to deny a license to petitioner.

This court has held in *Willner v. Committee on Character and Fitness* (1963) 373 U.S. 96, 10 L.Ed.2d 224, 83 S.Ct. 1175 that "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood." 373 U.S. at 103 as well as "notice of and a hearing on the grounds for his rejection." 373 U.S. at 105. The *Willner* case seemingly implies that there is a presumption that an applicant for a license is entitled to a hearing by due

process.

The controlling statute in the instant case is silent as to whether or not a hearing is required. *Willner* states

> "The rules adopted by the Board provide that 'the Board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, and with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." 373 U.S. at 103.

So seemingly the past decision of this Court would imply that in the absence of express language in the statute barring a hearing, one is implied by due process.

In conflict with this decision, the Appellate Court interpreted the due process cost-benefit test found in *Mathews v. Eldridge* (1976) 424 U.S. 319 to determine that no hearing was necessary. It is questionable whether or not this interpretation is correct. In the *Mathews* case, the decision was not that a hearing was not necessary, but that a hearing did not need to be held before Social Security payment of benefits could be terminated. This Court made its decision with the knowledge that a full evidentiary hearing would be eventually be held before the claim was finally terminated in order to satisfy due process. That is not the situation in the instant case. In the instant case, there is no future provision for a hearing of any kind.

Another example showing that the Court is not ready to do away with a hearing entirely is shown in

Goss v. Lopez (1975) 419 U.S. 565. which states that "under some circumstances students may properly be removed from school before a hearing is held, so long as the hearing follows promptly." 419 U.S. at 571. Again it is presumed that a hearing will eventually be held to satisfy due process requirements.

In conclusion, the interpretation of *Mathews* by the Appellate Court denying a hearing to petitioner is directly at odds with the Court's ruling in *Willner* and contrary to the spirit of the decisions made in both *Mathews* and *Goss* interpreting what the due process clause requires. This, we submit, raises an important consitutional issue of procedural due process resolved below in a way not in accord with the applicable decisions above.

II.

The decision below that a hearing can be denied because its allowance would place an "undue, if not impossible burden upon the State" raises important and unresolved questions.

The Appellate Court in its decision used the due process cost-benefit test described in *Mathews* at 424 U.S. 334-335 to determine that petitioner could be denied a hearing. In pertinent part, the Appellate Court held that:

"Requiring the Board, and by implication other

similar Boards, to provide a hearing to every unsuccessful test-taker for a professional license would place an undue, if not impossible, burden upon the State."

However, *Mathews* states:

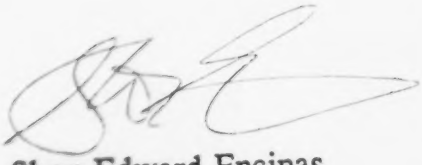
"Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." 424 U.S. at 348.

In the light of the interpretation of the *Mathews* decision in the Court below, we believe that the question of whether the right to a hearing can be denied because allowing it would overwhelm the courts with similar hearings is an important question.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,



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APPENDIX

[Case No. B073955]
[Filed July 27, 1994]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 5

REMITTUR NOTICE

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 04/13/94 is now final.

** Affirmed in Full. **

Respondent to Recover Costs On Appeal.

[signed]
JOSEPH A. LANE, Clerk
by: T. Carter-Mata, Deputy Clerk

[Case No. S040034]
[Filed July 13, 1994]

IN THE SUPREME COURT OF CALIFORNIA
IN BANK

Appellant's petition for review DENIED.
The request for an order directing publication of the opinion is denied.

[signed]
LUCAS
Chief Justice

[Case No. B073955]
[Filed May 5, 1994]

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK
DIVISION: 5

THE COURT:

Petition for rehearing denied.

[Case No. B073955]
[Filed April 13, 1994]

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

Shon Edward Encinas, in pro. per., for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, and W. Lloyd Paris, Deputy Attorney General for Defendant and Respondent.

Petitioner/appellant Shon Edward Encinas (appellant) sat for the examination to become a licensed electrical engineer and failed. He exhausted the applicable administrative appeal process, challenging the grade he received; and petitioned the superior court for a writ of administrative mandamus, ordering defendants/respondents the Board of Registration for Professional Engineers and Land Surveyors and Darlene Atkinson Stroup, its executive officer, (collectively as the Board) to issue appellant a license.

The superior court denied his petition, and this appeal followed. For the reasons set forth below, we affirm the judgment.

FACTS

The Board's Licensing Procedure

The Board is a licensing agency within the Department of Consumer Affairs of the State of California. Pursuant to Business and Professions Code section 6730, it is charged with the responsibility of determining which individuals are qualified for registration as a professional engineer.

Section 6751, subdivision (b), sets forth the following pertinent requirements for registration as a professional engineer: "(b) The applicant for registration as a professional engineer shall comply with all of the following: [¶] (1) Not have committed acts or crimes constituting grounds for denial of registration under Section 480. [¶] (2) Furnish evidence of six years or more of qualifying experience in engineering work satisfactory to the board evidencing that the applicant is competent to practice the character of engineering in the branch for which he or she is applying for registration, and successfully pass the second division of the examination. . . ."

According to Cindi Christenson, the Exam Unit Program Manager for the Board, the licensing examination procedure is as follows. The process begins when an applicant submits evidence of six years of

qualifying experience. All eligible applicants are then scheduled to sit for the examination.

The examination for electrical engineers is offered once a year in October; it is a national examination, administered in all fifty states. The exam is drafted, prepared, and graded by the National Council of Examiners for Engineering and Surveying (the NCEES). The examination is one day in length and made up of eight problems (essay and multiple choice), each worth ten points. A passing score is 48 points out of 80.

Completed examinations are forwarded to the NCEES for scoring, and essay problems are forwarded to a grader who receives training from the NCEES. The grader scores the problem utilizing the approved solution and grading plan.

The NCEES then reports the scores to the Board in Sacramento. Passing candidates are informed of their passing status only. Failing candidates receive their score, the required passing score, examination review and appeal information.

The procedure for appealing examination results is set forth in Title 16, California Code of Regulations, sections 443 and 444. The applicant is given the opportunity to review his or her examination and prepare a written appeal. The appeal is forwarded to the NCEES for re-scoring. The applicant is then informed by letter of the appeal results.

Appellant's Examination Results

Appellant sat for the October, 1990, electrical

engineer examination. The Board received a report from the NCEES indicating that appellant had received a score of 47 points. Appellant received 27 points from the multiple choice section, and 20 points on the essay questions, for a total of 47 points. For problem number 293, he received 4 points out of a possible 10 points. As noted, 48 points are required to pass the examination.

Appellant appealed his score on problem 293, following all required procedures. Problem 293 is a four part technical engineering question. The graders' standard scoring sheet indicates that a variety of possible scores were given for an applicant's answer.

Appellant's appeal consisted of a written explanation and supporting secondary sources. His appeal was forwarded to the NCEES for re-scoring, but the grader again awarded four points to appellant for this problem. After the petition at issue here was filed, the Board resubmitted appellant's appeal to the NCEES for another evaluation of his response to problem number 293. Again, the score was 4 points out of a possible 10.

Appellant did not apply to sit for the October 1991, or October 1992, examinations.

PROCEDURAL BACKGROUND

On August 20, 1992, appellant filed a petition for alternative writ of mandate, pursuant to Code of Civil Procedure section 1094.5. He sought a peremptory writ of mandate, ordering the Board to issue him an electrical engineer's license commensurate with his application and

corrected test result.

In his supporting memorandum of points and authorities, appellant argued that the Board abused its discretion when it refused to re-score his answer to problem 293 to give him "fair credit;" he also asserted that the Board abused its discretion by not giving him "a full and fair opportunity to appeal the grading of said problem." Appellant also filed the declaration of Meir Bartur, who had a Ph.D. degree in electrical engineering from Caltech, earned in 1984. Dr. Bartur declared that he had graded the question, as reconstructed by appellant, and determined that appellant should have been awarded a higher grade. He further declared, "It is true that more serious error was not detected by [appellant], but his answer reflects an understanding and mastering of the subject matter."

On December 24, 1992, the court entered judgment, denying the petition for writ of mandate. In pertinent part, the court's statement of decision provided, "The court has applied the substantial evidence test to determine whether the respondent Board has abused its discretion in grading the examination and subsequently denying the application for licensure. . . . [¶] the decision of respondent Board is supported by substantial evidence. Respondent Board did not fail to proceed in the manner required by law. respondent Board was not arbitrary or capricious and petitioner is not entitled to a professional engineers license based upon his October 1990, examination."

On February 19, 1993, appellant filed his notice

of appeal.

DISCUSSION

Appellant [Appellant appears before us in propria persona] contends his procedural due process rights were violated by the Board's failure to give him a hearing to challenge the grading of his examination; and the court prejudicially erred when it found that the Board's decision was supported by substantial evidence. Appellant asks that we remand to the trial court with directions that it order the Board to withdraw its decision that appellant failed the examination, and that it hold a hearing to decide the matter.

1. Procedural Due Process

We first address appellant's assertion that the court below failed to determine whether his due process rights had been abridged. As indicated, supra, the court's statement of decision specifically found that the Board had did not "fail to proceed in the manner required by law." this specific finding reveals that the court did consider but rejected appellant's due process argument.

Procedural due process rights can be protected through a variety of processes. The due process clause guarantees no particular form of procedure; the circumstances of an individual case determines the type of process needed. (See Mitchell v. W.T. Grant Co. (1973) 416 U.S. 600, 610.) We look, (a) to the private

interest involved; (b) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (c) the "government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Mathews v. Eldridge (1976) 424 U.S. 319, 334-335.)

(a) Here, appellant is an applicant who must comply with all statutory requirements before being issued a license as an electrical engineer. Appellant has no automatic right to this license. (See Jaffee v. Psychology Examining Comm. (1979) 92 Cal.App.3d 160.)

(b) We have set forth the process provided by statute to protect appellant's interest in his electrical engineering license. The procedure afforded an applicant who fails to pass the licensing examination is found in Title 16, California Code of Regulations, sections 443 and 444. In sum, the procedure gives the applicant an opportunity to inspect, review and provide a written appeal of his or her examination results. In the instant case, it is undisputed that the Board followed this procedure with respect to appellant's appeal. The determination of whether an applicant has passed a particular examination is based upon generally objective criteria; therefore there is little, if any, need for a hearing to cross-examine the grader on the criteria used. Appellant presented his position in lengthy written argument which was considered by the Board and by the

NCEES, twice after the initial grading.

(c) Finally, the governmental function involved is the granting of licenses to only those applicants who meet the qualifications set forth by statute. The State has a clear interest in ensuring that only qualified persons are licensed so as to protect the public from the consequences of shoddy electrical engineering. Requiring the Board, and by implication other similar Boards, to provide a hearing to every unsuccessful test-taker for a professional license would place an undue, if not impossible burden upon the State. (See Fuchs v. Los Angeles County Civil Service Comm. (1973) 34 Cal.App.3d 709, 715-716.)

We hold, therefore that the procedures set forth in the applicable statutes provide appellant with procedural due process, and he is entitled to nothing more.

Moreover, appellant's assertion that his due process was violated because he was not provided a copy of the examination question or to confront and cross-examine the grader is unavailing as against public policy. Civil Code section 1798.49, subdivision (e), and Government Code section 6354, subdivision (g), both specifically exclude from agency disclosure requirements any information which would compromise the objectivity or fairness of a competitive examination to determine fitness for licensure, test questions, scoring keys, and other examination data used to administer a licensing examination.

2. Substantial Evidence

Appellant challenges the trial court's finding that the Board's action was supported by substantial evidence. We do not agree. The sole issue before the trial court was the propriety of the scoring of appellant's examination. The record reveals that the court considered appellant's examination results; the original grading sheet; appellant's appeal from the examination results; a further explanation from the NCEES, the agency conducting the examination; and the declaration of appellant's expert, Meir Bartur.

The NCEES graders determined that appellant's answer to question 293 was worth only 4 points because, in part, appellant failed to identify the one "actual glitch" in the posed problem. Even appellant's expert agreed that appellant had failed to identify the more serious error.

Given this state of the evidence and the well-established proviso that the superior court does not and cannot act as a superexamining board (see Jaffee v. Psychology Examining Comm., supra, (1979) 92 Cal.App.3d at p. 169.), we find the requisite substantial evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

[signed]

GODOY PEREZ, J.

We concur,

[signed]

GRIGNON, Acting P.J.
ARMSTRONG, J.

[Case No. BS018753]
[Filed December 24, 1992]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPT: 85

STATEMENT OF DECISION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The petition for writ of mandate was argued and taken under submission on November 24, 1992. The court finds as follows:

Petitioner, an applicant for licensure from the Board of Registration of Professional Engineers and Land Surveyors, participated in the Board's written examination for licensure in October, 1990.

Petitioner received a score of 47 out of a possible 80 points on the examination. A minimum score of 48 was required to pass the examination for licensure. Additionally, on problem number 293 petitioner received a score of four points out of a possible 10 points.

Petitioner appealed his score to problem number 293. On May 2, 1992, respondent Board notified petitioner the results of the appeal denying any additional points.

The court has applied the substantial evidence test to determine whether the respondent Board has abused its

discretion in grading the examination and subsequently denying the application for licensure. Bixby v. Pierno (1971) 4 Cal.3d 130, 146; Jaffe v. Psychology Examining Com. (1979) 92 Cal.App.3d 160, 168-169.

The decision of respondent Board is supported by substantial evidence. Respondent Board did not abuse its discretion or fail to proceed in the manner required by law. Respondent Board was not arbitrary or capricious and petitioner is not entitled to a professional engineers license based upon his October, 1990, examination results.

The petition for mandate is denied; including the request for costs.

[signed]

ROBERT H. O'BRIEN
Judge of the Superior Court

[Case No. BS018753]
[Filed December 24, 1992]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPT: 85

JUDGMENT DENYING PETITION FOR WRIT OF MANDATE

The above entitled matter came regularly for hearing on November 24, 1992, in Department 85 of the above entitled court before the Honorable Robert H. O'Brien, judge presiding. Petitioner appeared by his counsel, the Law Offices of Kosnett & Durchfort, by James V. Kosnett, Esq. Respondents appeared by their counsel, Daniel E. Lungren, Attorney General of the State of California, by deputy attorney general W. Lloyd Paris.

The parties submitted written argument, including exhibits and orally argued the matter. The court considered and read the arguments. The matter was submitted with no additional evidence having been received by the court. The court issued its ruling on November 24, 1992, and has now issued its statement of decision.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that a peremptory writ of mandamus is denied to petitioner; that petitioner shall take nothing by

this action; and that the parties shall each bear their own costs in this action.

[signed]

ROBERT H. O'BRIEN
Judge of the Superior Court

[Dated May 21, 1992]

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

CORRECTION LETTER

Dear Mr. Encinas:

This is to acknowledge receipt of your recent appeal of the Professional Engineer examination you took in October 1990.

Upon further review by the NCEES (National Council of Examiners for Engineering and Surveying) your appeal has been considered and on problem(s) 293, no additional points were recommended to be added.

Based on this score adjustment, you still did not acheive the passing score adopted by the Board; therefore, you appeal was unsuccessful. This score adjustment became official at the November 8, 1991 Board meeting.

We wish you luck with your future examinations.

Sincerely,
[signed] PATRICIA E. CANTERBURY
Assistant Executive Officer